

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF VIRGINIA
Richmond Division

In re: **DAVID M. LAWRENCE**
Chapter 7 Debtor

Case Number: 04- 31626 DOT

DAVID M. LAWRENCE
Plaintiff

Adversary Proceeding No.05-3030-DOT

v.

DIRECT LOAN
PERKINS LOAN and
EDUCATIONAL CREDIT MANAGEMENT CORPORATION¹
Defendants

MEMORANDUM OPINION AND ORDER

Trial was held November 7, 2005, on the debtor's complaint to determine dischargeability of student loan debt based upon undue hardship, pursuant to §523(a)(8) of the Bankruptcy Code. At the conclusion of trial, the court ruled from the bench that judgment would be entered in defendants' favor. This opinion supplements the court's bench ruling.

Findings of Fact.

Debtor filed this chapter case on February 23, 2005, and this adversary proceeding on March 17, 2005.

Debtor works as a journalist and scientist and as a college faculty member. He has a

¹ The complaint originally named Sallie Mae as a defendant and included both regular student loan debt and HEAL loans. By the court's order entered May 20, 2005, Educational Credit Management Corporation (ECMC) was substituted for Sallie Mae as defendant. Subsequently, on July 11, 2005, the court entered a consent order substituting the United States Department of Health and Human Services as defendant for Sallie Mae with respect to the HEAL loans. Then, on August 18, 2005, the court granted the United States' motion to dismiss the complaint with respect to the HEAL loans. Thus, this opinion and order relate to the allegations of the complaint involving dischargeability of regular student loan debt as to which ECMC is the defendant.

masters degree in journalism from Columbia University and also holds a masters in geography. He entered the University of Virginia in 1991 as a doctoral candidate and remained there until he was dismissed in 2002. Debtor incurred the student loan debt at issue here while enrolled in this program. The loans have a current balance of approximately \$ 217,635.58.

Debtor is 44 years of age, married, and under no physical or mental disability. He is currently employed on a full-time basis for several universities as an adjunct professor. His income in 2005 will be approximately \$30,000.00. Debtor's wife is employed full time for the Commonwealth of Virginia and earns approximately \$35,000.00 per year. According to schedules filed with debtor's bankruptcy petition, the current monthly take home pay of debtor and his wife is \$4,421.44, and their monthly living expenses are \$4,595.00.

Debtor has made no payment toward his student loan debt and has declined to engage in a student loan Income Contingent Repayment Plan, which would have afforded him the opportunity to make payments based upon his family income.

Testimony of Vocational Expert Witness.

Defendants called Dr. Larry Sinsabaugh as a vocational expert witness. Prior to trial, Dr. Sinsabaugh had performed a vocational assessment of debtor, and a copy of his report was admitted into evidence. His evaluation of debtor took into account debtor's extensive educational background and work experience. In essence, Dr. Sinsabaugh testified that debtor has not conducted an effective job search and that consequently he is underemployed; there are numerous jobs in the Richmond metropolitan area for which debtor is qualified and which would afford a significant increase in salary.

Conclusions of Law.

Student loans are generally non-dischargeable; however, the exception to this rule allows a student loan to be discharged if “excepting such debt from discharge will impose an undue hardship on the Debtor and the Debtor’s dependents.” 11 U.S.C. § 523 (a)(8).

This court determines issues of undue hardship under the test set forth in *Brunner v. New York State Higher Education Services Corp.*, 831 F.2d 395, 396 (2nd Circuit 1987), e.g., (1) the debtor cannot maintain, based on current income and expenses, a “minimal” standard of living for himself and his dependents if forced to repay the loans; (2) additional circumstances exist indicating that the state of affairs is likely to persist for a significant portion of the repayment period of the student loan; and (3) the debtor has made good-faith efforts to repay the loans.

Here, debtor has failed to present any documentary evidence or other corroborating testimony in support of his contention that to require him to repay the student loan would create an undue hardship on him or his dependants. Given his present circumstances, the court finds that debtor can maintain, based upon his current income and expenses, a minimal standard of living for himself and his dependants if forced to repay the loans. This conclusion relies upon the expert vocational evidence that debtor, if he chooses, can earn significantly more than he does at present.

Additionally, debtor has not presented evidence to demonstrate by a preponderance of the evidence that his present circumstances are likely to worsen for a significant portion of the repayment period.

Finally, with respect to good-faith efforts to repay the loans, debtor has a duty to maximize his income based upon his education and experience, which he has failed to do. See *United States Dep’t of Educ. v. Gerhardt (In re Gerhardt)*, 348 F. 3d 89 (5th Cir. 2003) (holding

that debtor cannot work for low pay then “claim that it would be an undue hardship to repay his loans”). See also *Oyler v. Educ. Credit Mgmt Corp. (In re Oyler)*, 397 F. 3d 382 (6th Cir. 2005). Moreover, debtor has not made any payments on the subject student loan debt and has not engaged in good-faith efforts to modify the subject loan or to consider other repayment alternatives.

Because debtor has failed to sustain his burden of proof by presenting evidence to support a finding of undue hardship as set forth in the cases interpreting §523(a)(8), his complaint to determine the dischargeability of student loan debt must be dismissed.

Accordingly,

IT IS ORDERED that judgment is entered for defendants, and debtor’s complaint is dismissed.

SIGNED: _____ /s/ Douglas O. Tice Jr.
DOUGLAS O. TICE JR.
CHIEF JUDGE
UNITED STATES BANKRUPTCY COURT

Entered on Docket: _____

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